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No. 89-607

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE J. SMITH, EXECUTRIX OF THE ESTATE OF MICHAEL J. SMITH, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars a wrongful death action against the United States by the estate of a serviceman who was killed while serving as the pilot of the space shuttle Challenger.

2. Whether the estate may maintain a wrongful death action against an employee of the National Aeronautics and Space Administration.

3. Whether *Feres* should be overruled.

4. Whether the estate has standing to seek to compel the United States to debar the manufacturer allegedly responsible for the death of the serviceman.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 877 F.2d 40. The order of the district court dismissing the claims against the United States (Pet. App. A12-A70) is reported at 712 F. Supp. 893. The order of the district court dismissing the claims against Mulloy (Pet. App. A71-A73) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1989. The petition for a writ of certiorari was filed on October 10, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Navy Captain Michael J. Smith died in January 1986 aboard the space shuttle Challenger, to which he was assigned as pilot. For purposes of this petition, it is assumed that the cause of the accident was the failure of the aft field joint on the right-hand solid rocket booster. Petitioner, as executrix of Captain Smith's estate, instituted this action on behalf of the estate and Captain Smith's survivors against three defendants: the United States; Lawrence B. Mulloy (the manager of the National Aeronautics and Space Administration's (NASA) Solid Rocket Booster Program at the Marshall Space Flight Center); and Morton Thiokol, Inc. (the manufacturer of the shuttle's solid rocket motors). Petitioner sought damages for the wrongful death of Captain Smith, and also sought to compel NASA to debar Morton Thiokol from further work on the space shuttle program.

The district court first held that because Captain Smith's death occurred during activity incident to his military service, the wrongful death claim against the United States was barred by *Feres* v. *United States*, 340 U.S 135 (1950). Pet. App. A37-A38. The district court, in reaching that conclusion, relied on the three-part test set forth in *Parker* v. *United States*, 611 F.2d 1007 (5th Cir. 1980); under that test, whether an injury was incident to military service depends on "(1) the duty status of the service member; (2) the place where the injury occurred; and (3) the activity in which the serviceman was engaged at the time of the injury." Pet. App. A19. The district court noted, among other things, that Captain Smith "was on active military duty" at the time of the accident and that "his dependents are receiving death benefits under the Veterans' Benefits Act." *Id.* at A22-A23. Citing *Jaffee* v. *United States*, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982), and *Uptegrove* v. *United States*, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S.

1044 (1980), the court also dismissed the claims against Mulloy. It held that when *Feres* bars suit against the United States, a plaintiff may not bring the same action against a civilian government employee. Pet. App. A72-A73. In addition, the district court held that petitioner lacked standing to seek to compel the government to debar Morton Thiokol. *Id.* at A38.

The court of appeals affirmed. Pet. App. A1-A8. It agreed with the district court that because Captain Smith's death was incident to his military service, petitioner's wrongful death claim against the United States is barred by *Feres*. Pet. App. A3. It also agreed that when an injury occurred incident to service, a plaintiff may not avoid *Feres* by suing a government employee individually. *Id.* at A7. In addition, the court noted that the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, "apparently would apply to this case, foreclosing plaintiff's suit against Mulloy," since the Act "provides that the exclusive remedy for individuals allegedly harmed by common law torts committed by Government employees acting within the scope of their employment is through an action against the United States" under the Federal Tort Claims Act (FTCA). Pet. App. A8. The court of appeals did not discuss petitioner's request that the United States debar Morton Thiokol, although it noted that petitioner had settled with that defendant. *Id.* at A2.

ARGUMENT

1. In *Feres*, this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. Petitioner's wrongful death claim against the United States, while presenting unusual and tragic facts, involves a routine

application of *Feres*. As the district court stated in concluding that Captain Smith died incident to military service, "the activity in which [he] was engaged at the time of his death – piloting the space shuttle Challenger – arose by virtue of his status as a member of the armed services." Pet. App. A31. The district court further explained that Captain Smith "was aboard the space shuttle as a result of his participation in a program whereby military personnel are detailed to NASA to perform appropriate services." *Id.* at A32. Moreover, Captain Smith was on active duty at the time of the accident and, in addition to the settlement with Morton Thiokol, his dependents are receiving veterans' benefits. *Id.* at A2, A22-A23. Accordingly, the courts below correctly concluded that Captain Smith's activities while piloting the Challenger were incident to his military service. Therefore, contrary to petitioner's contention (Pet. 5-19), there is no warrant for further review of that fact-bound issue.

2. Nor is there merit to petitioner's contention (Pet. 19-28) that review is warranted with respect to dismissal of the claim against Mulloy.

a. The conclusion that a serviceman or his estate cannot sue a civilian government employee individually where *Feres* would bar a suit against the government follows from this Court's recent decisions in *United States* v. *Johnson*, 481 U.S. 681 (1987), and *United States* v. *Stanley*, 483 U.S. 669 (1987). In *Johnson*, the Court held that the estate of a serviceman who died in a helicopter crash could not bring suit under the FTCA for the alleged negligence of a civilian air traffic controller. 481 U.S. at 691-692. In *Stanley*, the Court held that when suit against the government is barred by *Feres*, a serviceman may not bring suit against individual defendants under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). 483 U.S. at 684. There is similarly no basis for allowing the estate of a serviceman whose injuries were incident to

military service to bypass *Feres* by bringing a wrongful death action against a government employee.[1]

Even before *Johnson* and *Stanley*, the courts of appeals recognized that state law tort claims against individual civilian government employees are barred if they are based on an injury suffered as an incident to military service. See Pet. App. A5-A6 & n.4. In *Jaffee*, 663 F.2d at 1239, the Third Circuit explained that such suits would be contrary to each of the rationales underlying this Court's decision in *Feres*: "Suits founded on state law have the same potential for undermining military discipline as federal tort claims. In addition, Veterans' Benefits are available for those bringing suits founded on state law, just as they are for those bringing federal tort claims suits. Allowing divergent and separate state claims would also directly contravene the third rationale for the decisions in *Feres* and its progeny – the need for uniform legal standards for military personnel." See also *Johnson*, 481 U.S. at 684 n.2 (discussing the rationales underlying *Feres*). No court of appeals has held that a serviceman injured incident to military service may sue a civilian government employee.

b. As the court of appeals recognized (Pet. App. A7-A8), there is an alternative ground of decision: petitioner's claim against Mulloy is barred by the Federal

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[1] Petitioner relies (Pet. 25-26) on *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), where the Court allowed a marine to sue his commanding officer. However, as this Court recognized in *Chappell* v. *Wallace*, 462 U.S. 296, 305 n.2 (1983), in holding that enlisted military personnel cannot bring *Bivens* actions against their superior officers, much has changed "since the time of *Wilkes*." There is now "a comprehensive system of military justice" for resolving intramilitary disputes (*ibid.*) and "a comprehensive system of relief," the Veterans Benefits Act, to remedy injuries incurred incident to military service (*Feres*, 340 U.S. at 140).

Employees Liability Reform and Tort Compensation Act of 1988. That Act, which was passed after the events in suit, applies to pending cases. See Pet. App. A8. It provides that the remedy against the United States under the FTCA for injury "resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." § 5, 102 Stat. 4564 (to be codified at 28 U.S.C. 2679(b)(1)). The 1988 Act further provides that, once the Attorney General certifies that the federal employee charged with misconduct was acting within the scope of his employment at the time of the incident, the United States shall be substituted as the defendant, and the suit shall then proceed against the government "subject to the limitations and exceptions applicable to those actions." § 6, 102 Stat. 4565 (to be codified at 28 U.S.C. 2679(d)(4)). Thus, the United States is to be substituted as the defendant even where, as here, suit against the government is barred. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988).[2]

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[2] In *Aviles* v. *Lutz*, 887 F.2d 1046 (1989), the Tenth Circuit recognized that a plaintiff whose claim against the government was barred by the intentional tort exception to the FTCA, 28 U.S.C. 2680(h), could not proceed against the individual government employees who allegedly harmed him. The Ninth Circuit reached the opposite conclusion in *Smith* v. *Marshall*, 885 F.2d 650, 654-656 (1989), petition for rehearing pending, No. 88-5757, holding that the 1988 Act did not preclude a medical malpractice claim against an individual where suit against the government was barred by the foreign country exception to the FTCA, 28 U.S.C. 2680(k). See also *Newman* v. *Soballe*, 871 F.2d 969, 971 (11th Cir. 1989). In reaching its conclusion, the Ninth Circuit did not come to grips with the language of Section 2679(d)(4), which provides that after the government is substituted as the defendant, the suit is "subject to the limitations and exceptions" to the FTCA. This is not an appropriate case to resolve any conflict between the circuits, however,

3. In addition to asking this Court to determine whether the courts below correctly applied the *Feres* doctrine to the peculiar facts, petitioner asks the Court to overrule *Feres*. Pet. 28-39. But this Court reaffirmed *Feres* recently in *Johnson*. Moreover, as the Court observed in *Johnson*, Congress is aware of the consistent holding that service members may not maintain tort actions for injuries incurred incident to military service, but has not "changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686 (quoting 340 U.S. at 138). Since *Johnson*, this Court has repeatedly declined to reconsider *Feres* in cases where petitioners asked that it be overruled. See, *e.g.*, *Major* v. *United States*, cert. denied, 108 S. Ct. 2871 (1988); *Atkinson* v. *United States*, cert. denied, 485 U.S. 987 (1988); and *Adams* v. *United States*, cert. denied, 484 U.S. 1004 (1988). Indeed, although the dissenting Justices noted in *Johnson* (481 U.S. at 703) that the serviceman's estate had not asked the Court to overrule *Feres*, this Court subsequently denied a petition for a writ of certiorari in *Gilardy* v. *United States*, cert. denied, 484 U.S. 1041 (1988), which arose from the same helicopter accident as *Johnson* and in which the petitioner explicitly asked the Court to overrule

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because, as both courts below held, the action against Mulloy (the individual defendant here) is independently barred by *Feres*. Moreover, this case was not litigated under the new law, which was enacted after the district court reached its decision, and in fact, the Attorney General has never certified that Mulloy was acting within the scope of his employment while he was working with Morton Thiokol in his capacity as manager of NASA's Solid Rocket Booster Program at the Marshall Space Flight Center. (The Attorney General would undoubtedly so certify, if necessary; the Department of Justice determined that it was appropriate for the government to represent Mulloy in this case.)

Feres. There is similarly no reason for the Court to reconsider *Feres* in this case.

4. Finally, petitioner contends (Pet. 39-48) that she has standing to seek an order compelling the government to debar Morton Thiokol from further work on the shuttle program. Petitioner is wrong. As this Court stated in *Valley Forge Christian College* v. *Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982): "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)." Additionally, a plaintiff must claim an interest that "is arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). Although petitioner alleges injuries resulting from the manufacturer's contractual relationship with the United States, the debarment remedy would not redress those injuries. In any event, petitioner does not come within the zone of interest protected by the debarment process. Debarment is a regulatory function performed in the public interest "for the Government's protection." 48 C.F.R. 9.402(b). The procedural protections afforded by the government are for the benefit of affected contractors. Petitioner cites no authority, and the government knows of none, to support her claimed right to act as a private attorney general in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00704